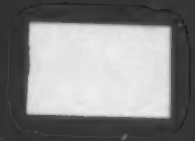
Petition



81-745

NO.

Office-Supreme Court, U.S.
FILED
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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

BONNIE VALENTINE,

Petitioner,

VS.

EUGENE SMITH, Interim President of Arkansas State University, et al,

Respondents.

PETITION FOR A WRIT OF CERTIORARI FROM FINAL JUDGMENT ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

The issue presented herein concerns the question of whether a state university can absolutely preclude consideration of white applicants for selected faculty positions as a means of fulfilling an affirmative action goal. Petitioner is a white female who applied for a faculty vacancy at Arkansas State University when the former black faculty member holding that position applied. At all times relevant herein, Arkansas State University was attempting to implement an Affirmative Action Program stating in part as follows:

> Looking ahead, we project that by the 1978-1979 academic year, blacks will constitute approximately five percent (5%) of the total faculty. Of the new faculty we expect to hire between now and 1979, twenty-five percent (25%) will be black. According to our projections for next year (1976-1977), we will hire three new black faculty and 15 new white faculty; for (1977-1978) four blacks and seven whites will be added; and for (1978-1979) four blacks and 11 whites.

Several white applicants and black applicants applied for said position. Petitioner was rated as the top applicant by the Faculty Appointment Committee, the Division Chairman, and the Dean. Their recommendations and the ranking of all applicants who had applied were forwarded to the Vice-President of Instruction at Arkansas State University for the formal offering of a contract. However, the Vice-President of Instruction then informed the Dean and Division Chairman that it would be hazardous to hire a white applicant for this position and that Arkansas State University was required to hire blacks for all positions

where a black applied and met minimum requirements. Then, a new list of applicants for the position was drawn up and sent to the Vice-President of Instruction, containing *only* black applicants. From this list, the faculty position was filled, and the Dean and Division Chairman who prepared the final list both candidly admit that the only reason the successful applicant received the position was because she was black and the only reason petitioner did not receive the position is because she was white.

Petitioner filed suit on August 26, 1976, relying on constitutional grounds and later amending her complaint to rely on 42 U.S.C.A., Section 2000(D). The District Judge in an opinion filed on May 7, 1980, ruled against Appellant and dismissed her Complaint. A timely Notice of Appeal was filed to the Eighth Circuit Court of Appeals where the Eighth Circuit ruled on July 21, 1981, that the university had the authority to reserve particular positions for minority applicants. This petition of certiorari is being timely filed to present the question of whether the second largest state supported institution in the State of Arkansas can target specific faculty positions for black applicants and absolutely preclude white applicants from being considered for these positions.

PARTIES

In the Eighth Circuit Court of Appeals the parties were:

Bonnie Valentine as the Appellant and present Petitioner.

Eugene Smith, Interim President of Arkansas State University; Richard Herget, Stan Langley, Lou Mixon

Angelo, Ben McGee, and Johnny Allison, Trustees of Arkansas State University; and Dr. Clark Elkins, Vice-President of Instruction, Arkansas State University; Appellees-Respondents.

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NO.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI FROM FINAL JUDGMENT ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

Bonnie Valentine, Petitioner herein, respectfully requests that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on July 21, 1981. No Motion for Rehearing was filed.

REPORTS OF OPINIONS BELOW

On July 21, 1981, the United States Court of Appeals for the Eighth Circuit issued an Opinion upholding the

Arkansas State University Affirmative Action Plan and approving of such plan's practice of targeting particular faculty positions for black individuals and absolute precluding white applicants for such positions. No Motion for Rehearing was filed. To the best of Petitioner's knowledge, the Eighth Circuit Opinion has not been published. Reproduction of that opinion will be found at Appendix "A".

In an Opinion filed of record on May 12, 1980, the United States District Court for the Eastern District of Arkansas issued findings of fact and conclusions of law dismissing Petitioner's claim. The case is reported as *Valentine v. Smith,* 654 F.2d 503 (8th Cir. 1981).

JURISDICTIONAL STATEMENT

Title 28 U.S.C., Section 1254(1) states that cases in the courts of appeals may be reviewed by this Court:

> By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . .

Title 28 U.S.C., Section 2101(c) states that:

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. . . .

Petitioner believes that this case involves a substantial constitutional question. Petitioner is not engaging in hyperbole when she states that the Affirmative Action Program approved by the Eighth Circuit and the Opinion of the Eighth Circuit approving same have extended the

concept of affirmative action and "reverse discrimination" farther than any precedent of any Court of Appeals or this Supreme Court. The legality of a state university's earmarking faculty positions for black applicants and precluding the consideration of white applicants for said positions is a matter greatly deserving of review by the highest court of the land before such a practice can be approved.

STATUTORY PROVISIONS INVOLVED

Title 42 U.S.C., Section 2000(d) is applicable:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

42 U.S.C., Section 1981 states as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exortions of every kind, and to no other.

STATEMENT OF THE CASE

Petitioner is a caucasian female teacher with a master's degree plus thirty hours and six years of teaching experience as an instructor in Business Education at Arkansas State University. She applied for a position as Instructor at Arkansas State University in May of 1976 after a vacancy occurred in the Business Department as a result of the resignation of a black faculty member. The University had advertised for applicants to fill such a position, such advertisements including language to the effect that the position was an entry level position requiring a master's degree.

Under the procedures set up by the university to fill the position, all applicants for the position were to be reviewed by the Faculty Appointment Committee of the Division of Business Education and such committee was to rank such applicants. In addition, the Division Chairman, Dr. Robert Ferralasco, was to evaluate and rank the applicants independently from the Faculty Appointment Committee. Then, the rankings by the Faculty Appointment Committee and the Division Chairman were to be forwarded to the Dean of the College of Business, Dr. Lonnie Talbert. Finally, the recommendations from the Dean would be forwarded to the Vice-President of Instruction, Dr. Clark Elkins, for the formal offering of the contract.

Petitioner herein was ranked at the top of the list of applicants by the faculty appointment committee. Dr. Ferralasco had a different list, but Petitioner also headed the list prepared by him. Both lists were forwarded to the Dean of the College of Business who forwarded the recommendation of the Petitioner for hiring to the Vice-President of Instruction, Dr. Clark Elkins. The black

individual who was actually hired to fill the position was not on either of the lists. After the Dean had recommended the employment of Petitioner to the Vice-President of Instruction, Dr. Elkins then consulted with the Division Chairman and the Dean informing them of the hazards of hiring a white applicant for the position and stating that the Department of Health, Education and Welfare require Arkansas State University to hire blacks for all positions where a black applied and met the minimum requirements. After such informal consultations with the Vice-President of Instruction, a meeting was held between the Vice-President of Instruction, the Affirmative Action Officer of the University, the Dean of the College of Business, and the Division Chairman where again the Vice-President of Instruction and the Affirmative Action Officer explained the hazards of hiring a white applicant for the position and the Division Chairman was told that Arkansas State University was under Court Order to hire blacks if blacks applied meeting the minimum requirements.

After such meeting, the Division Chairman felt compelled to recommend the black applicant for the position and composed a new list of recommended instructors for the position containing only the names of black applicants, some of whom were ranked on the original list and some of whom were added. The second name on the new list was that of an individual who had not been ranked in the top six applicants on either the Faculty Appointment Committee list or the Division Chairman list prior to the aforesaid meeting. In the Opinion of the Division Chairman and the Dean of the College of Business, this individual was not as well

qualified for the position as Petitioner but she was recommended for hiring solely because of her black ancestry.

Petitioner filed suit on August 26, 1976. The Eighth Circuit ruled on the matter on July 21, 1981, approving the Arkansas State University Affirmative Action Plan and all facets and specifically approving the practice of targeting specific faculty positions for black applicants. Petitioner contended that she has been the victim of an Affirmative Action Program which absolutely precludes consideration of white applicants and that as such the plan was unconstitutional and discriminatory. Petitioner continues to present this position at her final level of judicial review.

THE REASONS FOR GRANTING THE WRIT

Petitioner submits that the sweeping opinion by the Eighth Circuit Court of Appeals is the greatest extension of the concept of affirmative action and "reverse discrimination" by any federal court which has considered the question. Approval of a plan whereby a state university can designate a particular position for a black applicant irrespective of the merits and without consideration of any other applicant who applies for that same position is a practice which Petitioner decries in the strongest terms. Petitioner believes this is at variance with all constitutional guarantees and all prior decisions by this Court. At a very minimum, however, before such a practice should be approved, the practice should be reviewed by this Supreme Court.

Factually, the Dean at Arkansas State University testified that he understood the Affirmative Action Program at Arkansas State University as follows:

> "Well, I — it is my understanding of Affirmative Action Program in this regard is that we do have a goal — I guess you would call it — to increase the percentage of proportion of our faculty who are minority groups. And it was my understanding, after a discussion with the Affirmative Action Officer and the Vice-President that we were in a position where we — if a black applicant were to meet the minimum qualifications, that we were to consider that person for the position, yes."
>
> Question by Petitioner's Counsel: "Regardless of the other qualifications of a white applicant?"
>
> Answer: "Well, this was my understanding, yes."

The Dean later testified further on the point as follows:

> Question by Petitioner's Counsel: "All right. Now, from your position and from your participation in this process, is it not a fact that Bonnie Valentine did not get the recommendation to be interviewed and thus the inside step for the job, solely for the reason that she was white?"
>
> Respondent's Counsel: "I object again."
>
> The Court: "Overruled. You can answer the question."
>
> Answer: "Yes, this is my understanding because the two finalists whose names were submitted were, as you have indicated, both non-white applicants."
>
> Question: "All right. And, conversely, is it not a fact then that the major reason that Georgia Mitchell got the job was that she was black?"
>
> Answer: "I think you can say that, yes."

The other individual involved in the hiring process, Dr. Robert Ferralasco, further testified that Arkansas State University had to offer the job to a black if a black met minimum requirements. As to the issue of race, Dr. Ferralasco stated:

> Question by Petitioner's Counsel: "As to this particular case, Dr. Ferralasco, was Bonnie Valentine not given the position because of her caucasian ancestry?"
>
> Answer: "In my opinion, yes."
>
> Question: "And, conversely, did not Georgia

Mitchell get the position because of her negroid ancestry?"

Answer: "Yes."

Question: "Even though, in your opinion, Bonnie Valentine was much better qualified?"

Answer: "Yes."

The Eighth Circuit upheld the Affirmative Action Program and its application in this particular case stating that the plan did not completely bar whites or otherwise invidiously trammel their interest. Yet, the Eighth Circuit held that the practice of setting faculty positions aside exclusively for blacks is defensible. The Circuit said that some coordinator must have the authority to reserve a particular position for a qualified black applicant. The Business Department is a small department and the faculty position which became available was the only available position in that department for the school year in question. Petitioner cannot understand how the Eighth Circuit can argue that the reservation of the only available position in this department for a black applicant does not completely bar a white applicant from consideration or otherwise trammel the interest of a white applicant.

Petitioner believes that this case will present a matter for review that has not yet been specifically ruled on by this Court. In fact, the Eighth Circuit noted that the Supreme Court "has not yet defined guidelines for permissible affirmative action for employing state university faculty." The precedents of *University of California Regents v. Bakke*, 438 U.S. 265 (1978) and *United Steel Workers v. Weber*, 443 U.S. 193 (1979) are at best helpful by analogy. *Bakke* involves student admissions and *Weber* involved a

private Affirmative Action Program. Yet, and this is the point Petitioner is striving to make in the strongest terms, none of those cases have gone so far to hold that a particular position can be earmarked for a black applicant without any consideration given to white applicants, regardless of the merits of these white applicants. Bonnie Valentine could not have received this position regardless of the merits of her application. Indeed, with a master's degree plus 30 hours and six years of teaching experience, her qualifications were demonstrably better than the successful applicant who had only a master's degree and no college teaching experience. Yet she was not considered for the position simply because she was white. This would seem to fall under the language of Mr. Justice Powell in *Bakke*, supra, where he stated:

> "For preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." 265 U.S. at 307.

Petitioner herein is aware that the issue of "reverse discrimination" is a sensitive one. This is all the more reason as to why an opinion as far reaching as the present one is deserving of being reviewed by the highest court in the land. There is no finding or even any suggestion that the successful black applicant who benefited from the race-conscious plan had been the victim of actual discrimination in the past. There is no suggestion that Bonnie Valentine had been the beneficiary of actual discrimination in the past. Yet, her application is barred from consideration simply because she is white. In *Bakke*, supra, Petitioner understands this Court to have disapproved of a rigid quota system for black applicants. Yet, when there is only

one position available and that position is specifically earmarked for a black, an evil even worse than a quota system is allowed to exist. At least under a quota system, some whites have an opportunity to get some positions. Under an absolute minority preference for a position, *all* whites are absolutely precluded from consideration. It is this evil in this particular plan which has been upheld which Petitioner maintains makes this case the most sweeping example of "reverse discrimination" yet pronounced by any court. She asks for this Court to review the legality of same.

CONCLUSION

Petitioner herein respectfully requests that this Court issue a Writ of Certiorari to the Eighth Circuit and after briefing and oral argment reverse that court's approval of the absolute minority preference program instituted by Arkansas State University which absolutely precluded Bonnie Valentine from consideration for the faculty vacancy in question.

Respectfully submitted,

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Attorney for Petitioner

APPENDICES

APPENDIX "A"

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 80-1460

BONNIE VALENTINE ..... *Appellant*

v.

EUGENE SMITH, Interim President of Arkansas State University; Richard Herget; Stan Langley; Lou Mixon Angelo; Ben McGee and Johnny Allison, Trustees of Arkansas State University and Dr. Clark Elkins, Vice-President of Instruction, Arkansas State University ..... *Appellees*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

Submitted: February 9, 1981
Filed: July 21, 1981

Before LAY, Chief Judge, STEPHENSON and ARNOLD, Circuit Judges.

LAY, Chief Judge.

Ms. Bonnie Valentine, a white college instructor,

appeals from a judgment in an employment discrimination suit brought by her against officials of Arkansas State University. Valentine's complaint alleges that she is entitled to relief under 42 U.S.C. §1981; 42 U.S.C. §2000d; and the Fourteenth Amendment. This appeal raises important questions about permissible affirmative action under federal employment discrimination statutes and the Fourteenth Amendment.[1]

I. Background.

Arkansas State University, like many other colleges and universities, excluded blacks for most of its history. ASU made little progress toward desegregation until forced by the federal government. In 1968, HEW's Office for Civil Rights (OCR) began compliance reviews under Title VI of states that retained vestiges of a dual system of higher education, which reviews included the ASU campus. In January 1969, OCR wrote Governor Winthrop Rockefeller that the reviews of Arkansas' colleges and universities indicated that the state violated Title VI. The state developed a compliance plan. Another campus review at ASU in November 1970, raised further questions about discrimination against minorities. In August 1972, the ASU Board of Trustees made it the policy of the university to exert every reasonable effort to employ minority persons in professional positions. In February 1973, the *Adams v.*

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[1]This case was originally before this court in 1977; at that time we affirmed Judge Shell's denial of a temporary injunction to Valentine. (**Valentine v. Pritchard,** No. 77-1141 (8th Cir. Apr. 20, 1977)). The major testimony in this case was heard by Judge Shell in 1977. Before final judgment was rendered Judge Shell's untimely death intervened. In February 1980 Judge Roy heard further evidence and she rendered a judgment in May of 1980.

Richardson[2] decision ordered HEW to bring Arkansas into compliance with Title VI. In May 1973, OCR notified Governor Dale Bumpers that the 1969 statewide plan was inadequate. The state wrote a new plan but it failed to win OCR approval in 1973. In February 1974, ASU endorsed a revised statewide plan developed by the Arkansas Department of Higher Education. After further revisions, OCR approved the plan in July 1974, and promised to monitor its implementation. In August 1975, OCR documented "extensive failure to implement the Statewide Plan . . . [and that] violations of Title VI . . . continue to exist." After OCR threatened enforcement actions, the Governor, college and university officials, and OCR representatives met to discuss compliance efforts. In October 1975, ASU submitted its affirmative action program.[3] Compliance reviews by and ASU reports to OCR continued at least through 1976.

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[2]**Adams v. Richardson,** 356 F. Supp. 92 (D. D.C. 1973) (court ordred HEW to commence enforcement proceedings against several states, including the State of Arkansas, because their higher education systems were determined to be in violation of Title VI of the Civil Rights Act of 1964; **id.** at 94).

[3]The plan provided in part:

> 4.2 In terms of aggregate performance, there has been a steady increase in the percentage of black faculty among the total faculty, 1.4% in 1973-74, 2.4% in 1974-75, 3.4% in 1975-76. In 1973-74, there were 4 black faculty among 305 faculty members; in 1974-75, 7 out of 296; and 10 out of 296 in 1975-76. In terms of our goals expressed in the 1974 program, we have more than doubled the then-estimated percentage of black faculty (1.5%). Appendix F.
>
> 4.3 However, college-by-college statistics regarding the number of blacks contacted and interviewed as positions became available are discouraging. While there are indications that more intensive efforts have been made, college-by-college, to disseminate information about job opportunities more widely, the simple fact is that results are poor. Appendix G.

(Continued on page A-4)

During these efforts to desegregate ASU, Bonnie Valentine sought employment there in 1976. Valentine had previously taught business education at ASU from 1967 until she resigned in 1974. In 1976, Valentine's replacement, Adena Williams, the only black person on the business education faculty, resigned, and Valentine applied for her former position. The position required the applicant to have a master's degree in business education. Valentine had a master's degree, 30 additional hours of credit, and seven years of teaching experience at Arkansas State University.

4.5 Appendix H contains a college-by-college, department-by-department analysis of minority participation in ASU faculty and a comparison of ASU performance in securing black faculty with the availability of qualified blacks in the national labor pool. This comparison shows that underultilization of blacks exists in every college except the College of Liberal Arts. The goals that result from the department-by-department, college-by-college analyses are significantly lower than the ones we have set for ourselves. We believe that we have a responsibility to exceed the "goals to go." As black student enrollment increases, we will require more black faculty members to serve student needs, not only as teachers, but also as counselors and role models.

4.6 Appendix I provides a comparison of the availability of blacks in each discipline to their representation in the national and regional populations and a summary by entry level of University faculty hiring for the past three years. Examination of the comparison reveals that in each discipline blacks represent a smaller percentage of the labor pool than they do in the national and regional populations. Since Arkansas State University draws students from an area which has an above-average black population (23.6%), it has a special opportunity and responsibility to prepare black students for future employment, in academic fields in which blacks are currently underrepresented. Although ASU has a small graduate program which offers one specialist and several master's degrees, efforts will be made to interest black students in pursuing graduate studies both here and elsewhere.

Arkansas State University, Affirmative Action Program Pursuant to Title VI of the Civil Rights Act of 1964, at 6-10 (Oct. 1, 1975).

A faculty search committee, the division chairperson, and the dean of the College of Business Administration rated the applicants. Several of these individuals knew Valentine from when she first taught at ASU, and they recommended her as the most qualified of the sixteen applicants for the job. Dr. Robert Ferralasco, Chairperson of the Division of Business Education and Office Administration, gave a list of names, headed by that of Bonnie Valentine, to Dr. F. Clark Elkins, Vice-President for Instruction, for his consideration. Ferralasco and Elkins met with Marilyn Myers, the affirmative action officer for ASU, to discuss the list. After the meeting, Ferralasco submitted a new list of recommended applicants. Valentine's name was deleted from this list which contained only the names of two black applicants and no whites. ASU hired one of these two black applicants, Georgia Mitchell.

Valentine's burden was to persuade the court that ASU intentionally discriminated against her because of her race.[4] At trial, ASU asserted as a defense that it rejected Valentine because she was overqualified for the position and to hire her would create salary problems because of her previous experience and qualifications. The trial court noted this testimony, but did not seem to rule on this basis. The court dismissed the complaint with prejudice on the basis of ASU's implementation of its affirmative action plan. We agree with the appellant that the record demonstrates that the decision to hire Georgia Mitchell, a black, and reject Valentine, was substantially motivated by a race-conscious choice by ASU to implement its affirmative action plan.

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[4]**Texas Dep't of Community Affairs v. Burdine**, 101 S.Ct. 1091, 1094-95 (1981).

Valentine testified that both Dr. Ferralasco and Dr. Elkins told her ASU rejected her because she is white. Dr. Ferralasco testified that the top recommendation of the screening committee, division chairman, and Dean Lonnie Talbert was usually selected. Dr. Ferralasco stated that Dr. Elkins said ASU was under a court order to hire a black applicant, if a black met the minimum qualifications, but that ASU would hire Valentine if Myers determined that the affirmative action plan would permit it. Dr. Ferralasco substituted the names of two black candidates for the original list, which contained only the names of white applicants. Dr. Elkins admitted discussing affirmative action concerns at hiring discussions. Dr. Elkins apparently believed HEW viewed the school as having too few minorities and he feared HEW's reaction if the university replaced a black faculty member, Adena Williams, with a white applicant. Dr. Elkins' concern apparently arose from the university's small number of minority faculty in 1976 and previous "old boy school" hiring practices.

The state contends that it rejected Valentine because she was overqualified and not because she is white. Dr. Elkins testified that to hire someone with Valentine's qualifications at the annual salary of $10,500, the university would be buying a lawsuit. The fact that Dr. Ferralasco named none of the whites on his first list to his second list undermines the state's argument. We conclude that Valentine has demonstrated that the motivating factor in rejecting her was based upon the fact that she was white and the university was making a race-conscious choice in deference to its affirmative action plan.

II. Fourteenth Amendment.

The constitutional guarantee of equal protection does not prohibit states from taking appropriate measures to remedy the effects of past discrimination.[5] The Supreme Court has not yet defined guidelines for permissible affirmative action for employing state university faculty. Because the justification for race-conscious affirmative action is remedying the effects of past discrimination, a predicate for the remedy is that qualified persons make findings of past discrimination before the plan is implemented. Absent findings of past discrimination, courts cannot ascertain that the purpose of the affirmative action program is legitimate. Such findings enable courts to ensure that new forms of invidious discrimination are not approved in the guise of remedial affirmative action. Likewise, a court can determine that the remedy substantially relates to its purpose only if it is certain that the persons shaping and implementing the plan understood the nature and extent of the past discriminatory practices. *See Setser v. Novack*

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[5]In **Fullilove v. Klutznick,** 448 U.S. 448 (1980), Burger, C.J., and White and Powell, JJ., concluded that Congress could prefer minority contractors in order to avoid perpetuating the effects of prior discrimination. **Id.** at 472-78. Powell, J., writing separately concluded that redressing identified discrimination against minority contractors was a **compelling governmental interest. Id.** at 515. Marshall, Brennan, and Blackmun, JJ., concurring, concluded that remedying the present effects of past discrimination served **important governmental objectives. Id.** at 519-21.

In **University of California Regents v. Bakke,** 438 U.S. 265 (1978), Brennan, White, Marshall, and Blackmun, JJ., concluded that the need to counteract the effects of past societal discrimination served important governmental interests and justified use of a race-conscious admissions program. **Id.** at 326. Powell, J., indicated that ameliorating or eliminating the disabling effects of identified discrimination could constitute a compelling state interest in the presence of judicial, legislative, or administrative findings of constitutional or statutory violations. **Id.** at 307.

Investment Co., No. 80-1100, slip op. at —— (8th Cir. filed July ——, 1981).

The Supreme Court has determined that the Congress,[6] federal courts,[7] and, in some instances, the states[8] have the competency to make such findings of past discrimination as are sufficient to justify a race-conscious remedy.[9] The

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[6]**Fullilove**, 448 U.S. at 478 ("Congress had abundant historical basis from which it could conclude . . . that prospective elimination of these barriers to minority firm access to public contracting opportunities . . . was appropriate to ensure . . . equal protection of the laws.") (Burger, C.J., joined by White and Powell, JJ.) **See also id.** at 499 ("(T)he National Legislature is competent to find constitutional and statutory violations.") (Powell, J., concurring).

[7]**Dayton Bd. of Ed. v. Brinkman**, 433 U.S. 406, 419-20 (1977); **Swann v. Charlotte-Mecklenburg Bd. of Ed.**, 402 U.S. 1, 15 (1971).

[8]**McDaniel v. Barresi**, 402 U.S. 39 (1971); **Cf. United Jewish Orgs. v. Carey**, 430 U.S. 144, 162-64 (1977) (race-conscious remedy permitted without specific findings of previous violation).

[9]Justice Powell, in **Bakke**, stated that the University of California was not competent to make the requisite findings of constitutional or statutory violations such as would provide a compelling justification for a race-conscious remedy. 438 U.S. at 309-10. The four justices besides Justice Powell who reached the constitutional question in **Bakke** disagreed with him as to the competency of the University of California to institute a race-conscious remedy. As agencies receiving federal funds, universities are explicitly authorized by federal regulations to "take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin." 45 C.F.R. §80.3(b)(6)(ii) (1979). Justice Brennan, joined by White, Marshall, and Blackmun, JJ., stated:

> Indeed, the requirement of a judicial determination of a constitutional or statutory violation as a predicate for race-conscious remedial actions would be self-defeating. Such a requirement would severely undermine efforts to achieve voluntary compliance with the requirements of law. And our society and jurisprudence have always stressed the value of voluntary efforts to further the objectives of the law. Judicial intervention is a last resort to achieve cessation of illegal conduct or the remedying of its effects rather than a prerequisite to action.

(Continued on page A-9)

record reflects that HEW and the District Court for the District of Columbia found that Arkansas' colleges and universities did not comply with Title VI. Because of these findings and the action taken by OCR, ASU developed its affirmative action program. HEW and the district court are competent to make findings of past discrimination sufficient to justify the remedial purpose of an affirmative action program.[10]

There is no consensus on what findings of past discrimination justify remedial affirmative action.[11] Nevertheless, the issue of whether the findings of past discrimination made by the District of Columbia District Court and HEW were adequate to justify a race-conscious remedy is not even close. Findings of previous statutory violations of

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438 U.S. at 364.

We need not decide whether Arkansas State University was competent to make findings sufficient to justify the purpose of its affirmative action program. The history of the program reveals that these findings were made by other entities.

[10]**Bakke**, 438 U.S. at 301-02 (Powell, J.). Justices Brennan, White, Marshall and Blackmun apparently would not require such findings by HEW or the district court as a predicate to affirmative action. **Id.** at 363-66. **See also Caulfield v. Board of Ed.**, 632 F.2d 999, 1006 (2d Cir. 1980).

[11]Justice Stevens would apparently require finding that the beneficiaries of the race-conscious remedy have been the victims of actual discrimination in the past. **Fullilove**, 448 U.S. at 537-48, 553. For Justice Powell, the remedial purpose of race-conscious remedies could be sufficiently justified by findings of statutory or constitutional violations. **Bakke**, 438 U.S. at 301-02, 307. Justices Brennan, White, Marshall, and Blackmun would permit states to use race-conscious remedies "where there is reason to believe that the evil addressed is a product of past racial discrimination." **Id.** at 366; **see also Local 35, IBEW v. City of Hartford**, 625 F.2d 416, 421-22 (2d Cir. 1980); **United States v. City of Miami**, 614 F.2d 1322, 1337-38 (5th Cir. 1980); **Detroit Police Officers' Ass'n v. Young**, 608 F.2d 671 (6th Cir. 1979), **pet. for cert. filed** 48 U.S.L.W. 3466 (Jan. 10, 1980) (79-1080).

Title VI by a district court and OCR justify the use of some type of race-conscious remedy by a state to serve its constitutionally permissible objective of remedying past discrimination.

We now turn to the question of whether, as a means to accomplish the plainly constitutional objective of remedying past discrimination, the State of Arkansas can prefer a black applicant over a white for a particular faculty vacancy. Arkansas could not practically achieve its constitutionally permissible ends in the foreseeable future without the use of race-conscious remedies. We examine the means used by Arkansas without any bright line distinction between permissible and impermissible affirmative action plans.[12] Any racial preference must receive a searching examination to make certain that it does not conflict with constitutional garantees. 448 U.S. at 491. Until we know more about the long-term effects of affirmative action, however, we are reluctant to discourage states from

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[12]The standard of revew of the method employed by the state to accomplish its constitutional objective cannot be easily discerned from **Bakke** and **Fullilove.** Justices Brennan, White, Marshall, and Blackmun would inquire whether the preference "stigmatizes any discrete group or individual and whether race is reasonably used in light of the program's objectives. . . ." **Bakke**, 438 U.S. at 373. The Chief Justice would require that the means be narrowly tailored to accomplish the constitutional objective, **Fullilove**, 448 U.S. at 480-82, but his test does not appear to be a very strenuous one. **See Id.** at 532-54 (Stevens, J., dissenting). Justice Powell would require that the means selected be equitable and reasonably necessary to the redress of identified discrimination, in light of (1) alternative remedies, (2) duration of the preference program, (3) the relevant population or work force, (4) flexibility of the program, and (5) the effect on innocent parties. 448 U.S. at 510-15.

acting voluntarily to remedy past racial discrimination.[13] A flexible evaluation of the means adopted by Arkansas is all the more appropriate in this case because, on the one hand, the state faced termination of federal benefits and liability for past discrimination against blacks, if it failed to institute an affirmative action plan, and, on the other hand, it faced liability to whites for any voluntary preferences adopted to mitigate the effects of prior discrimination against blacks. *See generally United Steelworkers v. Weber*, 443 U.S. 193, 210 (1979) (Blackmun, J., concurring); *Setser*, slip op. at ——; *Hunter v. St. Louis-San Francisco Ry.*, 639 F.2d 424, 425 n.2 (8th Cir. 1981). The test for determining whether Arkansas has adopted constitutionally permissible means is whether the affirmative action plan is "substantially related" to the objective of remedying prior discrimination.[14] A race-conscious affirmative action program is substantially related to remedying past discrimination if (1) its implementation results or is designed to result in the hiring of a sufficient number of minority applicants so that the racial balance of the employer's work force approximates roughly, but does not unreasonably exceed, the balance that would have been achieved absent the past discrimination; (2) the plan endures only so long as is reasonably necessary to achieve its legitimate goals; (3) the plan does not result in hiring unqualified applicants; and

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[13]In **Fullilove**, the Chief Justice quoted with approval a statement of Justice Brandeis: "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation." 448 U.S. at 491, **quoting New State Ice Co. v. Liebmann**, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[14]**See Fullilove**, 448 U.S. at 482-92, 508-10, 519; **Bakke**, 438 U.S. at 359; **United States v. City of Miami**, 614 F.2d at 1338-40; **Detroit Police Officers' Ass'n**, 608 F.2d at 696; **Carter v. Gallagher**, 452 F.2d 315, 330-31 (8th Cir. 1971) (en banc), **cert. denied**, 406 U.S. 950 (1972).

(4) the plan does not completely bar whites from all vacancies or otherwise unnecessarily or invidiously trammel their interests.

III. ASU'S Affirmative Action Plan.

ASU's affirmative action plan set a goal[15] of raising the percentage of blacks on the faculty to a total of five percent by 1979.[16] To reach this goal, ASU planned that 25

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[15]The validity of a state's affirmative action program should depend on a determination of the relation of the preference to the purpose of remedying past discrimination and not on whether a state is able to conceal its action in subtle language. Any distinction between goals, quotas and targets is primarily semantic. **See Bakke**, 438 U.S. at 378 (opinion of Brennan, White, Marshall and Blackmun, JJ.). But see Justice Powell's distinction between impermissible quotas and flexible racial preferencs. 438 U.S. at 317.

[16]ASU'S affirmative action plan provided in part:

> 4.7 Looking ahead, we project that by the 1978-79 academic year, blacks will constitute approximately 5% of the total faculty. Of the new faculty we expect to hire between now and 1979, 25% will be black. According to our projections for next year (1976-77), we will hire 3 new black faculty and 15 new white faculty; for 1977-78, 4 blacks and 7 whites will be added; and for 1978-79, 4 blacks and 11 whites. Appendix J. Because of the extreme scarcity of blacks in some disciplines, we do not expect the department-by-department increases to be the same. We intend to reassess biennially our effort to achieve this goal.
>
> 4.9 A solution to the difficulty of hiring black faculty may lie in a new approach, one which attempts to develop a faculty labor pool from within.
>
> (a) Recruitment of black students as potential faculty members. ASU will identify prospective black faculty among undergraduate and graduate students. The University will commit funds to professional development programs designed specifically to provide assistance to prospective black faculty to complete their professional training. University counselors and faculty advisors will be informed about the disciplines in which minority representation is low so that they can encourage minority students who show interest and aptitude in those fields to begin training for employment.

(Continued on page A-13)

percent of the faculty hired between 1976 and 1979 would be black. These goals do not exceed reasonable efforts to remedy ASU's past discrimination. In 1976, when Valentine was not hired for the position, ASU had 10 black faculty members among a total faculty of 296 (3.4% of faculty was black). Upon Adena Williams' retirement, the Business College had no black faculty members. If Valentine had been rehired, the Business College would have continued to have no black faculty members at least until the next vacancy occurred. ASU attracts students from an area which has a population which is approximately 23.6% black. We find that the plaintiff has failed to show that ASU's goals exceed those which would be substantially related to ASU's legitimate purpose.

ASU's 25% hiring goal is neither permanent nor even long lasting. Instead, ASU's plan extends over a four-year period and contemplates the achievement of a modest increase in black faculty members. Nothing about the duration of the plan suggests any purpose other than a remedial one and Valentine has not shown that the period of the plan exceeds the time substantially necessary for achieving the plan's remedial purpose.

4.10 At present, the staff in the President's Office has the responsibility for monitoring the process of recruiting new faculty to insure that qualified blacks are given complete consideration in filling every vacancy. The specific procedures used to assure the implementation of ASU's affirmative action efforts and the data collection procedures used to measure the University's success will be developed by the Affirmative Action Officer, who will be functioning by December 1, 1975.

4.11 In summary, we believe that these positive steps, combined with the work of a full-time affirmative action staff, should enable ASU to reach its goals for hiring minority faculty and and to comply with Title VI requirements.

An affirmative action plan may be constitutionally infirm if it unduly stigmatizes either the beneficiaries or the persons disadvantaged by the plan. *Bakke*, 438 U.S. at 374-75. But a plan designed to eliminate past racial discrimination is not invalid merely because some innocent persons bear the brunt of the racial preference. *Fullilove*, 448 U.S. at 484. So long as a plan does not result in the hiring of unqualified persons, we conclude that any stigma caused by the plan is constitutionally acceptable. Members of the majority group are rarely, if ever, stigmatized by operation of a racial preference; it is hard for us to believe that people will treat Bonnie Valentine as a second class person because a black person was hired instead of her. The more serious risk of stigma is with the successful minority applicant. The absence — not the presence — of affirmative action stigmatizes minority groups, by perpetuating the disadvantages of minorities. When an institution remedies its past wrongs by providing opportunities for members of previously victimized groups it does not stigmatize those groups. Where the applicant is qualified, the risk of stigma is considerably less because presumably the person can perform the task adequately. The evidence in this case shows not only that Georgia Mitchell was fully qualified for the job but also she performed very well as a teacher. We cannot invalidate ASU's affirmative action plan, or its application to the facts here, on the supposition that someone might be stigmatized.

ASU'S affirmative action plan does not require firing any employees to make room for minority applicants. Nor does the plan deprive innocent persons of employment rights or benefits they already enjoyed. The plan contemplates that only 25% of new faculty over a four-year period

will be black; we cannot say that this plan completely bars whites from faculty positions.

In summary, because we find ASU's affirmative action goals substantially related to the legitimate goal of ending and remedying previous racial discrimination, because the plan does not require the hiring of unqualified persons, because it is temporary, and because it does not completely bar whites or otherwise invidiously trammel their interests, we conclude that ASU's plan, on its face, is a constitutionally permissible solution to a difficult problem. *United States v. City of Miami*, 614, F.2d at 1338-40; *Detroit Police Officers' Ass'n v. Young*, 608 F.2d at 696.[17]

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[17]ASU could achieve its legitimate goal of a faculty with five percent of its members being black if twenty-five percent of the new faculty members hired between 1976 and 1979 were black. Valentine argues that ASU illegitimately singled out the business college vacancy as an exclusively minority position in violation of the principles established in **Bakke**. Even assuming ASU set aside that vacancy as exclusively for blacks, the practice is defensible. To ensure that the university achieves its affirmative action goals some coordinator must have the authority to reserve a particular position for a qualified minority applicant, if such applicant can be found. A particular faculty position may remain occupied for many years and then become open for hiring purposes at any time during a particular academic year due to the faculty member's notice of termination. Moreover, in this case, the initial stages of ASU's faculty hiring process were completed by members of the particular college where the vacancy occurred. No consideration of university-wide policy goals affected the decision-making process until quite late in the search process. The situation in student admissions is distinguishable. In **Bakke**, 100 positions became available each year in the first-year Davis medical class. Also, under both the Davis and Harvard plans, discussed in **Bakke** at 438 U.S. at 316, the admissions programs were apparently coordinated from start to finish by a central office which could take into consideration university-wide goals at each stage of the admissions process. Justice Powell deemed constitutionally preferrable an approach which was more "flexible" than guaranteeing 16 positions for minorities, because Davis' legitimate goals could be reasonably

(Continued on page A-16)

IV. Title VI.

Valentine seeks relief under Title VI of the Civil Rights Act of 1964, §601, 42 U.S.C. §2000d.[18] Section 2000d-3 limits employment discrimination claims under Title VI to situations where the federal assistance is designed to provide employment.[19] Valentine has not shown that ASU received federal assistance to provide faculty employment. We dismissed the Title VI claim and express no opinion on the issues of (1) whether Title VI provides a private

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achieved under the less restrictive plan. 438 U.S. at 315-18. Where, as here, a more "flexible" approach may not guarantee the attainment of legitimate university goals because of the nature of ASU's hiring procedures, we conclude that ASU's designation of the business college vacancy as a position for a qualified minority applicant was a constitutional means to achieve ASU's legitimate goals.

[18] 42 U.S.C. §2000d provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

[19] 42 U.S.C. §2000d-3 provides:

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

See Simpson v. Reynolds Metals Co., 629 F.2d 1226, 1235 n.16 (7th Cir. 1980); **Trageser v. Libbie Rehab. Center, Inc.**, 590 F.2d 87, 89 (4th Cir. 1978); **Caulfield v. Board of Ed.**, 583 F.2d 605 (2d Cir. 1978).

right of action,[20] (2) whether a plaintiff may recover compensatory damages under Title VI, [21] or (3) whether the Eleventh Amendment bars a money judgment against these defendants.[22]

V. Section 1981.

Valentine's claim under 42 U.S.C. § 1981 is dismissed on the basis of this court's recent en banc opinion in *Setser v. Novack Investment Co.*, No. 80-1100 (8th Cir. filed July ——, 1981). An affirmative action plan of a governmental employer that passes constitutional muster does not violate Section 1981. *Local* 35, *IBEW v. City of Hartford*, 625 F.2d 416, 425 (2d Cir. 1980); *Detroit Police Officers, Ass'n v. Young*, 608 F.2d 671, 692 (6th Cir. 1979).

Judgment affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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[20]**See Cannon v. University of Chicago**, 441 U.S. 677 (1979). **See also University of California Regents v. Bakke**, 438 U.S. 265, 379 (1978) (separate opinion of White, J.); **Guardians Ass'n v. Civil Serv. Comm'n**, 633 F.2d 232, 274 (2d Cir. 1980); **N.A.A.C.P. v. Medical Center, Inc.**, 599 F.2d 1247, 1248 (3d Cir. 1979); **Bossier Parish School Bd. v. Lemon**, 370 F.2d 847, 852 (5th Cir.), **cert. denied**, 388 U.S. 911 (1967).

[21]**See Chambers v. Omaha Pub. School Dist.**, 536 F.2d 222, 225 n.2 (8th Cir. 1976); **N.A.A.C.P. v. Medical Center, Inc.**, 599 F.2d at 1248 n.1; **Guardians Ass'n**, 633 F.2d at 254-63 (opinion of Circuit Judge Meskill) and 272-74 (opinion of District Judges Coffrin and Kelleher).

[22]**See Quern v. Jordan**, 440 U.S. 332 (1979); **Weisbord v. Michigan State Univ.**, 495 F. Supp. 1347 (W.D. Mich. 1980).

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

BONNIE VALENTINE ..... *Plaintiff*

vs. No. J-76-C-78

EUGENE SMITH, Interim President of Arkansas State University; RICHARD HERGET, STAN LANGLEY, LOU MIXON ANGELO, BEN McGEE, and JOHNNY ALLISON, Trustees of Arkansas State University; and DR. CLARK ELKINS, Vice-President of Instruction, Arkansas State University ..... *Defendants*

FINDINGS OF FACT

This Court has jurisdiction over the parties hereto and subject matter jurisdiction pursuant to 42 U.S.C. §§1981 and 1983. The case was initially filed as a class action by plaintiff, Bonnie Valentine. In her complaint she requested that a preliminary injunction be issued requiring officers and trustees of Arkansas State University, the defendants, to refrain from pursuing unconstitutional practices of discrimination on the basis of race against her and the members of her class who seek employment at Arkansas State University.

The District Court (Honorable Terry Shell) heard considerable testimony at the hearing on the preliminary injunction but denied relief. After considering the record and argument of counsel, the Eighth Circuit Court of Appeals also denied relief.

After Judge Shell's untimely demise the cause was transferred to this Court and a trial on the merits was held February 20, 1980. Briefs have been submitted* and the cause is now ready for decision. Before the hearing on the merits the class action aspect of the case was abandoned.

(1) Plaintiff Bonnie Valentine is a caucasian female teacher with a master's degree and six years of teaching experience as an instructor in Business Education at Arkansas State University. She applied for a position as instructor at Arkansas State University in May of 1976 after a vacancy occurred.

(2) Arkansas State University is a state supported university located in Jonesboro, Arkansas; and the defendants are officials and trustees of the University. Eugene Smith is the interim president of Arkansas State University; Defendants Richard Herget, Stan Langley, Lou Mixon Angelo, Ben McGee, and Johnny Allison are trustees of Arkansas State University; and Defendant Clark Elkins is the Vice-President of instruction at Arkansas State University.

(3) In the spring of 1976, a black female instructor in the Business Education Department at Arkansas State University tendered her resignation creating a vacancy in such Department of Business Education for the 1976-1977 school year. Before any advertising was done to attract applicants to the job, it was determined that the position would be filled as an entry level position paying a starting salary of $10,500.00 per year. The sole and only qualification set for the position, which was later advertised, was a master's degree in business education. Teaching experience

*The last brief was filed April 11, 1980.

and hours of education beyond a master's degree were not qualifications or requirements for the job.

(4) Prior to 1976, Arkansas State University was required to draft and have approved by the Department of Health, Education and Welfare an affirmative action plan stating goals for minority employment. This was mandated pursuant to the case of *Adams, et al v. Richardson*, 356 F. Supp. 92 (D.C. D.C. 1973).

(5) Arkansas State University's affirmative action plan did not set quotas for hiring of any racial minorities, but rather was based upon the assumption that certain desired goals of minority employment would be reached by insuring that the applicant pool for any vacancy would include minority applicants.

(6) Whether intentional or coincidental, Blacks had been grossly underrepresented on the faculty of Arkansas State University prior to the establishment of the Affirmative Action Plan. In 1969 the only black instructor on campus was an officer in the R.O.T.C. department, who was assigned, not by the University, but by the Department of the Army.

(7) The plaintiff who was white and Georgia Mitchell who was black, along with other persons, made application for the job vacancy. The applicants met the requirement, i.e., a master's degree in business education.

(8) The plaintiff possessed more teaching experience than Georgia Mitchell and also had 30 hours beyond a master's degree. No other candidate had as much experience as plaintiff — or as many hours as she did. The Faculty Appointments Committee, the Division Chairman and the Dean of the College of Business Administration, all initially

recommended Bonnie Valentine to the Vice-President of Instruction for hiring.

(9) The Faculty Search Committee, Division Chairman and Dean of the College of Business Administration can only recommend for hiring. Hiring at Arkansas State University is done by the Vice-President for Instruction and the President of the University, with the concurrence of the Board of Trustees.

(10) The Vice-President for Instruction expressed concern about the possibility of hiring Bonnie Valentine for this position and made his doubts known to the Division Chairperson and the Dean. The doubts were not on account of Bonnie Valentine's race, but rather based upon these reasons:

(a) The Vice-President for Instruction was of the opinion that the plaintiff was overqualified for the job, in that it had been determined before any applications were even advertised that the only qualification for this entry level position was a master's degree in business education. Upon that assumption 16 applications were received, many with this qualification alone or little in addition to it. The Vice-President for Instruction thought it would be unfair to other applicants to advertise one qualification for a job and then use other qualifications as the criteria for selection thereby subjecting the University to criticism.

(b) The amount of money allocated for the salary of this job was only $10,500.00. Plaintiff's teaching experience and hours beyond a master's degree qualified her for a salary in excess of this figure.

Other teachers with these qualifications were paid considerably more. The Vice-President for Instruction was concerned that hiring plaintiff at this salary would subject the University to a later suit by plaintiff for the difference between the salary she was paid and the salary to which she should have been entitled based upon her experience and credit hours.

(11) Thereafter, these concerns, and the fact that the University was required to conform to an affirmative action program was discussed with the Division Chairperson and the Dean. The Dean then forwarded to the Vice-President for Instruction the name of two persons for interviewing, but the plaintiff's name was not on the new list. One of the named persons was Georgia Mitchell, who was hired.

(12) At the time of the hearing on the temporary injunction in this cause, the Division Chairman rated the job performance of Georgia Mitchell as "good" and three years later at trial on the merits he rated her job performance as "very good".

CONCLUSIONS OF LAW

(1) Arkansas State University has in effect an Affirmative Action Plan which has been approved by HEW. This is not only legally permissible, it is mandatory. *Adams, et al v. Richardson,* 356 F. Supp. 92 (D.C. D.C. 1973). Arkansas State University has goals for minority employment, not quotas which is clearly permissible. Accordingly, the Court finds the Affirmative Action Program at Arkansas State University, both as written and as practiced, is valid under the criterion set out in *Regents of the Universi-*

ty of California v. Bakke, 438 U.S. 265 (1978). See also *Steelworkers v.. Weber,* 443 U.S. 193 (1979).

(2) The refusal of Arkansas State University to employ the plaintiff does not involve a question of constitutional discrimination or violation of any rights of plaintiff under the Constitution and laws of the United States.

(3) This Court does not find plaintiff's position to be entirely without merit; however, since both Georgia Mitchell and the plaintiff were qualified for the vacancy, it was within the expertise and discretion of the University officials as to which applicant would be employed. This Court, absent legal reasons, should not interfere with the University's hiring practices and policies.

This action should be and is hereby dismissed with each party to pay their own costs.

DATED this 7th day of May, 1980.

/s/ Elsijane T. Roy,
United States District Judge.

CERTIFICATE OF SERVICE

I, Bill W. Bristow, hereby state that I have at the time of mailing this Petition for Certiorari to the Supreme Court also served the Honorable Berl M. Smith, attorney for all respondents herein, P.O. Box 1245, Citizens Bank Building, Jonesboro, Arkansas 72401, with copies of said Petition. This Certificate of Service is made in compliance with Rule 33 of the United States Supreme Court Rules.

/s/ Bill W. Bristow,
Attorney for Petitioner

Opposition

Office - Supreme Court, U.S.
FILED
APR 16 1981
ALEXANDER L. STEVAS

No. 81-745

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BONNIE VALENTINE, *Petitioner*,

v.

EUGENE SMITH, Interim President
of Arkansas State University, *et al.*, *Respondents*.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court review a decision of the United States Court of Appeals for the Eighth Circuit that affirmed the right of Arkansas State University, in the course of implementing an affirmative action plan established pursuant to federal administrative and judicial mandates, to select a qualified black applicant over a qualified white applicant for a faculty vacancy as a means to accomplish the objective of remedying past discrimination?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-745

BONNIE VALENTINE, *Petitioner*,

v.

EUGENE SMITH, Interim President
of Arkansas State University, *et al.*, *Respondents*.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Eugene Smith, Interim President of Arkansas State University, *et al.* (hereinafter "Arkansas State University" or "Respondent") respectfully request that this Court deny the Petition for Writ of Certiorari seeking to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

Contrary to the statement of Petitioner, the opinion of the Eighth Circuit is reported as *Valentine* v. *Smith*, 654 F.2d 503 (8th Cir. 1981); it is reproduced at Appendix A-1 through A-17 of the Petition. Contrary to the statement of Petitioner, the opinion of the United States District Court for the Eastern District of Arkansas has not been reported; it is reproduced at Appendix A-18 through A-23 of the Petition.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

REASONS FOR DENYING THE WRIT

Rules 17.1(a) and (b) are inapplicable to this case.[1] The Eighth Circuit has not "decided a federal question in a way in conflict with applicable decisions of this Court" nor has it "decided an important question of federal law which has not been, but should be, settled by this Court." Rule 17.1(c). Further, this case presents no other reason for the Court to issue a writ of certiorari.

I.

Petitioner Has Mischaracterized The Holding Of The Eighth Circuit.

Petitioner asserts that the issue as to which certiorari should be granted "concerns the question of whether a state university can *absolutely preclude* consideration of white applicants for selected faculty positions as a means of fulfilling an affirmative action goal." (Emphasis added) (Pet. Br., p. i) She argues that the Eighth Circuit held that "the University had the authority to reserve particular positions for minority applicants." (Pet. Br., p. ii) She alleges that the Eighth Circuit "specifically approve[d] the practice of targeting specific faculty positions for black applicants." (Pet. Br., p. 6) The Petitioner's several statements of the purported holding of the Eighth Circuit are erroneous. The Eighth Circuit held only that Arkansas State University could select a qualified black applicant over a qualified white applicant for a faculty vacancy in the course of implementing an affirmative action plan[2] designed to remedy, over a specified period of time, the effects of past discrimination in faculty hiring.

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[1] Petitioner does not (and cannot) assert that the opinion below is in conflict with a decision of any other court of appeals.

[2] The text of the affirmative action program (without appendices) is attached hereto as Appendix A.

The panel (Chief Judge Lay, and Circuit Judges Stephenson and Arnold) first reviewed the history of efforts by Arkansas State University to comply with desegregation orders by administrative agencies of the Federal government and by a United States District Court. Turning to the facts of this case, the court found that Petitioner had applied for an opening on the faculty of the business school of the University that "required the applicant to have a master's degree in business education." (Pet. Br. App. A-4) There were no other qualifications. While Petitioner had additional graduate school and teaching experience, this experience was superfluous in terms of the qualifications established and advertised by the University. Two blacks, including the individual who ultimately was awarded the available position, applied; they had the qualifications required.

The Eighth Circuit agreed with Petitioner that "the record demonstrates that the decision to hire Georgia Mitchell, a black, and reject Valentine, was substantially motivated by a race-conscious choice by ASU to implement its affirmative action plan." (Pet. Br. App. A-5) Assuming for present purposes that the Eighth Circuit correctly stated the holding of the District Court and properly evaluated the evidence of record, *neither of which is conceded by Respondent*,[3] the opinion of the Eighth Circuit does not raise the issue suggested by Petitioner.

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[3] The Eighth Circuit recognized that the University asserted as a defense at trial that Petitioner was rejected "because she was overqualified for the position and to hire her would create salary problems because of her previous experience and qualifications." (Pet. Br. App. A-5) It suggested that the trial court "noted this testimony, but did not seem to rule on this basis. The court dismissed the complaint with prejudice on the basis of ASU's implementation of its affirmative action plan." (Pet. Br. App. A-5) The opinion of District Judge Roy is reprinted in the Appendix to the brief of Petitioner. (Pet. Br. App. A-18 — A-23) In Findings 10 and 11 (Pet. Br. App. A-21 — A-22), Judge Roy set forth the evidence supporting the view that Petitioner was not rejected by the University because of her race. It is the position of

With specific reference to the affirmative action plan, the court found that the goals (see Appendix A, ¶ 4.7) "do not exceed reasonable efforts to remedy ASU's past discrimination," (Pet. Br. App. A-13) that "[n]othing about the duration of the plan suggests any purpose other than a remedial one and Valentine has not shown that the period of the plan exceeds the time substantially necessary for achieving the plan's remedial purpose," (Pet. Br. App. A-13) and "not only that Georgia Mitchell was fully qualified for the job but also she performed very well as a teacher." (Pet. Br. App. A-14) Of critical importance in light of the mischaracterizations in the Petition, is the fact that the court, noting that the plan "contemplates that only 25% of new faculty over a four-year period will be black," specifically held — "we cannot say that this plan completely bars whites from faculty positions." (Pet. Br. App. A-14 to A-15)[4]

Respondent that, at a minimum, these factual findings constituted an alternative basis for the District Court's conclusion that there was no "question of constitutional discrimination or violation of any rights of plaintiff" in this case. (Pet. Br. App. A-23)

[4] District Judge Roy made the following finding of fact:

> Arkansas State University's affirmative action plan did not set quotas for hiring of any racial minorities, but rather was based upon the assumption that certain desired goals of minority employment would be reached by insuring that the applicant pool for any vacancy would include minority applicants. (Pet. Br. App. A-20)

The only reference to the business college vacancy as supposedly constituting "an exclusively minority position" is found in a hypothetical discussion in footnote 17 of the Eighth Circuit's opinion. (Pet. Br. App. A-15 — A-16) That footnote obviously was drafted to respond to the argument Petitioner made below and renews here. The court offered the observation (clearly dicta in this case) that a practice of setting aside a particular vacancy for blacks "is defensible." While the rationale set forth in footnote 17 is compelling in its logic, nevertheless, the case before the Court does not raise this issue. Both the Eighth Circuit and the District Court recognized that the affirmative action plan did *not* contemplate that a specific faculty position would be set aside for black applicants alone.

The entire thrust of Petitioner's argument in support of her petition for certiorari is founded on the assertion that the holding of the Eighth Circuit endorses an affirmative action plan that contemplates reserving or allocating a specific position or positions for minority applicants. The argument upon which the Petition is founded is fatally defective, since *there was no such finding or holding by the Eighth Circuit.*[5] Thus, petitioner seeks to have this Court review a holding which the Eighth Circuit did not make.

II.

The Opinion Below Is Not In Conflict With Applicable Decisions Of This Court.

Petitioner has failed to show, and indeed has not even seriously argued, that the question decided by the Eighth Circuit is in conflict with any applicable decisions of this Court. With the possible exception of a misplaced reliance upon a quotation from the opinion of Mr. Justice Powell in *University of California Regents* v. *Bakke*, 438 U.S. 265 (1978) (see Pet. Br., p. 10), Petitioner has neither discussed nor mentioned any prior decision of this Court with which either the result or the reasoning of the Eighth Circuit is in disagreement. This failure is not surprising since the decision of the Eighth Circuit is perfectly consistent with recent opinions of this Court which have addressed the issue of permissible remedial responses by federal, state and private entities to correct the effects of prior discrimination. *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980); *United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979); *University of California Regents* v. *Bakke*, 438 U.S. 265 (1978).

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[5] The court summarized its holding as follows:

> In summary, because we find ASU's affirmative action goals substantially related to the legitimate goal of ending and remedying previous racial discrimination, because the plan does not require the hiring of unqualified persons, because it is temporary, *and because it does not completely bar whites or otherwise invidiously trammel their interests*, we conclude that ASU's plan, on its face, is a constitutionally permissible solution to a difficult problem. (Pet. Br. App. A-15) (Emphasis added)

In the first instance, and as the Eighth Circuit clearly recognized, any race-conscious employment decision made pursuant to the Arkansas State University affirmative action plan clearly satisfies the standards enunciated by a majority of this Court in *Bakke, supra*. The common ground of the constitutional issue in *Bakke* was the recognition that some finding of discrimination was a necessary underpinning for establishing the remedial purpose of a race-conscious selection program. Although there were differences of opinion on the Court concerning the evidentiary foundation upon which such prior discrimination could be established, there is no doubt in the present case that the Arkansas State University affirmative action plan clears even the most conservative reading of *Bakke*.

As the Eighth Circuit opinion stated, the question of the sufficiency of past findings of discrimination to support the remedy provided by the Arkansas State University plan "is not even close." (Pet. Br. App. A-9) Here, the record establishes (1) the virtual absence of any black faculty members at Arkansas State University prior to 1969;[6] (2) specific findings by the United States District Court for the District of Columbia of noncompliance by the State of Arkansas, among others, with the requirements of Title VI of the Civil Rights Act of 1964;[7] and (3) at least six audits and findings by HEW between 1968 and 1975 of insufficiencies in the efforts of Arkansas State University to comply with the requirements of Title VI.[8] It was in response to these findings and proddings that Arkansas State University adopted and implemented the affirmative action plan which Petitioner seeks to attack. There can be no question

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[6] In 1969, Arkansas State University had only one black faculty member, a member of the ROTC faculty, who was assigned to the University by the Department of the Army. (Record of Prelim. Injunction at 372; Trial Record at 104)

[7] Adams v. Richardson, 356 F.Supp. 92 (D.D.C. 1973).

[8] Pet. Br. App. A-2 — A-3.

on this record that *Bakke* fully supports the constitutionally permissible purpose of Respondent's affirmative action plan. [9]

Apart from the validity of the purpose of the plan itself, it is also apparent that the implementation of that plan which resulted in the selection of a qualified black applicant for the position sought by Petitioner offends no prior decision of this Court. What Petitioner, in a transparent effort to equate the present case with the special admissions program in *Bakke*, erroneously describes as absolute preclusion or an absolute racial preference for the job in question amounts to no more than the consideration of race as a factor in the evaluation and selection process between qualified candidates competing for the same position. A majority of this Court in *Bakke* specifically held that race could be taken into account as a factor in decisions of the type at issue here even when there has been no administrative or judicial finding of past discrimination, and could be a "plus" factor which in some circumstances might tip the scales in favor of a black applicant over a white applicant for the same position. *Bakke*, 438 U.S. at 317.

In essence, Arkansas State University here did neither more nor less than that which was expressly approved in *Bakke* by taking the race of equally qualified applicants for the same job into account in reaching a final employment decision. [10] More-

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[9] The language at page 307 of *Bakke* has been taken out of context by Petitioner (Pet. Br., p. 10) and cannot be stretched to support Petitioner's argument as to the alleged invalidity of the plan. It is clear that Mr. Justice Powell was simply stating the obvious — a plan or program which bestows preferences to a group on the basis of racial identity *alone* is not constitutional. Such is not the case here, for any racial preference arising out of the plan was not based upon race alone but rather was a result of remedial action to eliminate the effects of prior discrimination which had been found to exist in the employment of faculty at Arkansas State University.

[10] Both here and in the courts below, Petitioner has advanced the contention that she was "more qualified" for the position than the successful black applicant, pointing to her previous teaching experience and her graduate

over, the race of the competing applicants was taken into account not only to further the goal of creating a culturally diverse educational community — a state interest found by Mr. Justice Powell in *Bakke* to be "compelling" — but to achieve the goals of a federally mandated affirmative action plan, the purpose of which was to remedy the effects of past proven discrimination.

The Eighth Circuit also properly evaluated the scope and dimensions of the Arkansas State University affirmative action plan in accordance with the principles set forth in *United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979). The Arkansas State University plan was temporary in nature, did not bar whites from consideration for employment, did not require the employment of unqualified applicants or the replacement of whites by blacks and did not otherwise "unnecessarily trammel" the interests of white applicants for employment at Arkansas State University. [11] The record amply supports these determinations, both generally and with respect to the specific claim asserted by Petitioner, and these findings are clearly consistent with *Weber*.

The decision of the court below is also entirely in accord with, and is not as far reaching as, *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980). There the Court held that a federal statute and regulations that *required* at least 10 percent of federal funds granted for local public works projects to be allocated to

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studies beyond the Master's Degree level. The fact remains, however, that the only qualification for the job in question was a Master's Degree and that the black applicant satisfied this requirement on the same footing as Petitioner. (Pet. Br. App. A-4 and A-14) That Georgia Mitchell was competent and qualified for the position is also borne out by the opinion of her superiors that "she performed very well as a teacher." (Pet. Br. App. A-14) Petitioner is not competent to determine the qualifications for Arkansas State University faculty positions and it is not the function of this Court to do so. *See* Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

[11] *See* Pet. Br. App. A-14 — A-15 and *supra*, p. 5 n.5.

"minority business enterprises" was a constitutionally permissible means of remedying the effects of past discrimination. Unlike the Arkansas State University plan under which whites were able to compete for each faculty opening, the statute and regulations in *Fullilove* set aside at least 10 percent of available funds to be used exclusively for minority businesses. Significantly, the Court in *Fullilove* stated that the program would have passed constitutional muster under any test articulated in the several opinions in *Bakke*. 448 U.S. at 492.[12] The Eighth Circuit properly followed the majority in *Fullilove* in finding that an affirmative action plan that used race as a factor in making faculty hiring decisions was a permissible means of honoring Arkansas State University's obligation to attempt to remedy the effects of past racial discrimination.

In summary, Petitioner's dissatisfaction with the fact that race may have "tipped the balance" in favor of an otherwise qualified applicant fails to raise *any* constitutional question, let alone one in conflict with prior decisions of this Court.

III.

No Useful Purpose Would Be Served By Reviewing The Decision Below.

Petitioner has grossly mischaracterized the holding of the Eighth Circuit. The actual holding of that court is consistent with all relevant authorities emanating from this Court, and does not present "an important question of federal law which has not been, but should be, settled by this Court." Rule 17.1(c). Nor is there any other reason to grant certiorari.

Arkansas State University has attempted to implement a reasonable affirmative action program. With respect to the

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[12] The Court in *Fullilove* recognized that the expectations of certain non-minority persons might be frustrated by the allocation requirement. The Court held, however, that "[w]hen effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible." 448 U.S. at 484.

particular faculty vacancy at issue, a hiring decision made pursuant to the plan resulted in the hiring of a black. Any person — black, white, male, female, majority, minority — is free to apply for the next and every other vacancy at the University. A decision by this Court to review the opinion below of necessity places this Court in the role of second-guessing *ad hoc* hiring decisions made by a university attempting to implement an affirmative action plan that is designed to remedy the effects of judicially determined past discrimination. No valid purpose would be served by such an exercise. [13]

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[13] Petitioner lists 42 U.S.C. § 2000d and 42 U.S.C. § 1981 as "statutory provisions involved" in this case. (Pet. Br., p. 3) She never mentions either provision again. No question is presented under either Title VI or Section 1981. (Pet. Br. App. A-16 — A-17)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

ARKANSAS STATE UNIVERSITY

Affirmative Action Program Pursuant To Title VI Of The Civil Rights Act Of 1964

1. INSTITUTIONAL COMMITMENTS: PURPOSE, POLICY, AND OBJECTIVES

1.1 Arkansas State University is committed to the principle of equal opportunity for all. This is a policy enunciated by the Board of Trustees and through them delegated for implementation to the President, serving as the chief executive officer of the Board. In turn, day-to-day supervision of an equal opportunity program will be administered by a full-time equal opportunity officer and staff, reporting directly to the President. Recruitment for this position is under way, and the equal opportunity/ affirmative action officer will be employed within sixty days.

1.2 There is also the recognition that merely enunciating this policy is not enough. Ultimately, the true test of commitment rests upon affirmative action performance measured against the stated objectives within a specific time frame. We expect to set goals and measure performance every biennium.

1.3 The objectives dealt with in this report are concerned exclusively with equal opportunity for blacks. In due time, these objectives will be incorporated into a more comprehensive equal opportunity/affirmative action program for the University which will be responsive to Executive Order 11246 and Title IX.

1.4 Accordingly, our primary concerns in this report are the recruitment and retention of minority students and the recruitment and hiring of minority faculty and staff. This affirmative action plan deals separately with each of these four categories, analyzing our problems, presenting solutions, and establishing certain goals and objectives.

2. STUDENT RECRUITMENT

2.1 The policy of Arkansas State University is to maintain an aggressive and comprehensive program of student recruitment. A supporting process of open admissions provides enrollment opportunity for all students who either show promise of being able to work at ASU standards or demonstrate a willingness to enroll for preparatory courses which will enable them to achieve acceptable levels of performance.

2.2 Toward this end, a comprehensive program of student recruitment has been initiated, the details of which are presented in Appendix A. Within this program special efforts have been made to deal specifically with problems of recruitment of minority students. In an area of Arkansas where black student enrollment in high schools is high, comprehensive scheduling results in satisfactory contact with black juniors and seniors. Black members of the ASU staff have been used in the recruitment programs as are black students, both individually and in groups.

2.3 In addition, financial aid resources have been increased and made available. A total of 684 black students enrolled for the 1974-75 academic year. A total of 347, or 51%, received financial aid through our federal campus-based programs. Approximately 12% of white students were able to qualify for aid. Black students make up 29% of the total recipients in NDSL, SEOG, CWS, and BEOG categories and were awarded 25% of the aid. Seventy-seven, or 9%, of the students who received aid through institutionally-based programs were black. The above figures do not include the Student Guaranteed Loan Program through which approximately 650 students received approximately $800,000. It is estimated that 25% of these were black. Appendix B.

2.4 Statistics indicate that these recruitment efforts have been productive. During the past five years, the enrollment of black students has doubled in terms of percentage of the student body; and the degree of increase of black students has proceeded at about four times the rate of increase of all students at ASU.

Illustrative of this is the comparison of total enrollment. Figures related to black enrollment are listed below.

Fall Semester	Total Enrollment	Black Students N	Black Students % Student Body	Enrollment Growth Blacks	Enrollment Growth All Students
1970	6,098	183	3	N/A	−4.0%
1971	6,605	234	4	28%	+8.0%
1972	6,624	342	5	46%	+0.3%
1973	6,460	371	6	8%	−2.0%
1974	6,687	466	7	26%	+3.0%
1975	7,176	572 (est.)	8	23%	+7.0%

2.5 Despite this, we believe we have the responsibility to do better. Our expectations are that student enrollment at Jonesboro will increase over the next three biennia to at least 8,650. The black student enrollment should increase to 12% of the total student body, compared with 8% in 1975.

ENROLLMENT PROJECTIONS

Fall Semester	Black	White	Other	Total
1976	664 (9%)	6,660 (90.3%)	52 (.7%)	7,376
1978	895 (11%)	7,184 (88.3%)	57 (.7%)	8,136
1980	1,038 (12%)	7,551 (87.3%)	61 (.7%)	8,650

2.6 To achieve these objectives, we intend to move ahead with specifically designed additions to our recruitment program. Included in these are:

(a) Advisory committee. During the 1975-76 academic year, an advisory committee from the black community in eastern Arkansas will be organized to assist ASU in identifying the types of programs which the black community wants from ASU and to help in recruiting black students to the University. The members of this committee will represent a cross section of the black population.

(b) High school contact. ASU representatives, including black members of the staff, faculty, and student body, will continue to visit all Arkansas high schools to encourage people to come to ASU. Black high school students will also be brought to the campus for information sessions, guided tours, financial aid counseling, and enrollment. In the year 1975-76, we expect all black faculty members to be involved in recruiting trips and efforts.

(c) Community college contact. Since the community colleges of eastern Arkansas have high percentages of black students, we will continue recruitment visits to community colleges and will make vigorous efforts to develop programs to attract community college transfers.

(d) Financial aid. Our past record of financial aid to black students has been instrumental in producing the steady increase of minority student enrollment. The University's policy will be to expand our commitment of financial aid to minority students and to encourage flexibility in the administration of financial aid in order to meet emergency or unusual needs. Appendix C.

2.7 In summary, we do not, on the basis of performance in the past five years, anticipate difficulty in contacting and recruiting minority students.

3. STUDENT ADMISSION AND RETENTION

3.1 In terms of admission of minority students, ASU perceives no significant problems. The University implements a policy of open admissions, the details of which are set forth in DHE Form II-A, Items I-V, and amplified in the ASU 1975-76 undergraduate bulletin. Appendix D. Our view is that an active recruitment program supplemented by open admissions policy opens a clear track for minority enrollment.

3.2 Only one undergraduate area is subject to test cut-off scores. The associate degree program in nursing uses an American College Test composite score of 16 as a guideline, while the B.S. program uses an ACT composite score of 18. Students

below these points may be evaluated by the Nursing Admissions Committee, which then considers the student's total record. These scores are not absolute cut-off points, merely guidelines. However, since the beginning of its use as a selection tool in 1974, the ACT requirement has not discriminated unfairly against minority students. In two years, only 38 applicants (7 blacks and 31 whites) have been denied admission to the nursing program. Any student whose ACT composite score falls below the minimum guideline point is encouraged to enroll in University courses outside the Division of Nursing. If a "C" average (2.0 on a 4.0 scale) is maintained on twelve semester hours of University work, the student is then granted full admission to the nursing program of his/her choice — associate degree program or bachelor degree program.

3.3 Retention of minority students, once admitted, is a primary concern. In response to this, ASU has introduced a variety of courses which are intended to provide remedial and enrichment programs.

3.4 Courses in study techniques, vocabulary building, English skills, reading, and remedial mathematics are being offered to better equip students to succeed in their regular course work. The reading laboratory offers both accelerated and remedial programs. All departments have been encouraged to provide extra "help sessions" for students experiencing academic difficulties. The mathematics and history divisions have responded extensively. English faculty members give 10 hours a week in individual "help sessions."

3.5 ASU has also recognized the need for special leadership and counseling in that area which supervises the early planning and programming of undeclared majors. Dr. Mossie Richmond, an experienced black educator, has been named Dean of the University College, the first such appointment in Arkansas and perhaps in the Mid-South. In addition to providing personal guidance and counseling, Dr. Richmond supervises an expanded counseling staff which is composed of two

counselors, one of whom is a woman. ASU has a black male counselor in the Office of Student Affairs, whose primary duty is counseling resident men students.

3.6 We believe remedial and enrichment courses, combined with counseling, have been useful in effecting satisfactory retention of minority students.

3.7 Our most recent head-count analysis of undergraduate students at ASU reveals a retention rate for black students of 76%, compared with 72% for white students. The retention rate for black graduate students (71% from the fall, 1973 to fall, 1974) is also higher than for white graduate students (70% from 1973 to 1974). Appendix E.

3.8 While these figures demonstrate a degree of effectiveness in achieving retention goals, we are also committed to improvements:

(a) Counseling program. We intend to employ a black female counselor next year (1976-77) to work in women's residence halls. We seek a person who is skilled in group as well as individual counseling techniques. Our black women students who live on campus are in dire need of the services of this type of counselor. When an additional counselor is employed in the counseling center, a qualifed black person will be sought to fill the position.

(b) Financial aids counselor. An additional counselor in financial aid is needed at this time. Every possible effort will be made to fill this position with a qualified black person. It is obvious that a black counselor in the area of financial aids is needed, since such an appreciable amount of financial aid is awarded to black students.

(c) Developmental studies. We plan a full-scale review of our need for a more comprehensive developmental studies program. As our minority enrollment increases, we anticipate a greater need for up-to-date, effective enrichment courses.

(d) Black student activities. The University will continue to encourage participation of blacks in a wide variety of student activities. Black students hold prominent positions in student government and athletics. A black student was elected Homecoming Queen last year. The Black Students Association sponsors many activities including dances, lectures, film festivals, and Black History Week.

3.9 In summary, while we believe we can improve performance in recruiting and retaining minority students, compliance problems at ASU in the student sector with regard to Title VI requirements are not considered serious.

4. FACULTY HIRING

4.1 However encouraging and promising our results may be in terms of student recruitment and retention, ASU has not demonstrated a capacity to implement an effective program of recruiting minority faculty.

4.2 In terms of aggregate performance, there has been a steady increase in the percentage of black faculty among the total faculty, 1.4% in 1973-74, 2.4% in 1974-75, and 3.4% in 1975-76. In 1973-74, there were 4 black faculty among 305 faculty members; in 1974-75, 7 out of 296; and 10 out of 296 in 1975-76. In terms of our goals expressed in the 1974 program, we have more than doubled the then-estimated percentage of black faculty (1.5%). Appendix F.

4.3 However, college-by-college statistics regarding the number of blacks contacted and interviewed as positions became available are discouraging. While there are indications that more intensive efforts have been made, college by college, to disseminate information about job opportunities more widely, the simple fact is that results are poor. Appendix G.

4.4 Two problems appear to be significant. Although there is a sizable national labor pool among faculty, qualified black faculty within this labor pool are recipients of intensive recruitment. The emphasis on hiring minority faculty in both private and public colleges and universities has reduced the pool sub-

stantially. This situation, combined with low salary standards in Arkansas, adds to difficulties in attracting black faculty. In addition, a small professional black population in Jonesboro inhibits, to a certain degree, the development of a satisfactory family and social environment. Limited housing at satisfactory levels also inhibits recruitment. While more intensive and better-focused advertising can help identify prospects, salary and living conditions are substantial barriers.

4.5 Appendix H contains a college-by-college, department-by-department analysis of minority participation in ASU faculty and a comparison of ASU performance in securing black faculty with the availability of qualified blacks in the national labor pool. This comparison shows that underutilization of blacks exists in every college except the College of Liberal Arts. The goals that result from the department-by-department, college-by-college analyses are significantly lower than the ones we have set for ourselves. We believe that we have a responsibility to exceed the "goals to go." As black student enrollment increases, we will require more black faculty members to serve student needs, not only as teachers, but also as counselors and role models.

4.6 Appendix I provides a comparison of the availability of blacks in each discipline to their representation in the national and regional populations and a summary by entry level of University faculty hiring for the past three years. Examination of the comparison reveals that in each discipline blacks represent a smaller percentage of the labor pool than they do in the national and regional populations. Since Arkansas State University draws students from an area which has an above-average black population (23.6%), it has a special opportunity and responsibility to prepare black students for future employment in academic fields in which blacks are currently underrepresented. Although ASU has a small graduate program which offers one specialist and several master's degrees, efforts will be made to interest black students in pursuing graduate studies both here and elsewhere.

4.7 Looking ahead, we project that by the 1978-79 academic year, blacks will constitute approximately 5% of the total faculty. Of the new faculty we expect to hire between now and 1979, 25% will be black. According to our projections for next year (1976-77), we will hire 3 new black faculty and 15 new white faculty; for 1977-78, 4 blacks and 7 whites will be added; and for 1978-79, 4 blacks and 11 whites. Appendix J. Because of the extreme scarcity of blacks in some disciplines, we do not expect the department-by-department increases to be the same. We intend to reassess biennially our effort to achieve this goal.

4.8 A possible solution is to focus more intensively upon a regional and statewide labor pool. Here again, there are limitations, not the least of which is the weakening of faculty at black colleges and universities as their faculty are lured away to other opportunities. Nevertheless, we will take the following steps to draw applicants for faculty positions from this pool:

(a) Announcements. All vacant positions will be announced in leading black professional publications, *The Chronicle of Higher Education*, and the *Arkansas Gazette*.

(b) Graduate school contact. ASU will maintain close contact with graduate schools from which it has been successful in hiring new faculty in order to identify early in the recruitment process prospective black faculty.

(c) Dissemination of availability data. All faculty and staff who have any responsibility for hiring faculty members will be informed about the availability of black educators in this region as these data are compiled in Gail F. Isbell's study and similar future documents.

(d) Faculty housing. Existing faculty housing will be offered, on a preferential basis, to any newly hired black faculty. The Jonesboro City Council has enacted a fair housing ordinance. The University will cooperate with black faculty to help them obtain suitable housing.

4.9 A solution to the difficulty of hiring black faculty may lie in a new approach, one which attempts to develop a faculty labor pool from within.

(a) Recruitment of black students as potential faculty members. ASU will identify prospective black faculty among undergraduate and graduate students. The University will commit funds to professional development programs designed specifically to provide assistance to prospective black faculty to complete their professional training. University counselors and faculty advisors will be informed about the disciplines in which minority representation is low so that they can encourage minority students who show interest and aptitude in those fields to begin training for employment.

(b) Professional development assistance for black faculty. Black faculty who lack the doctorate will be encouraged and aided by the University in their efforts to return to school for advanced training. Recipients of University aid will agree to return to teach or serve as administrators for three years after completing their advanced work.

(c) Cooperative Education Program. One example of our effort to increase minority participation in academic labor pools and in other labor pools in which blacks are underrepresented is the University's recent application for a grant from the Office of Education under Title IV-D of the Higher Education Act of 1965, as amended. The purpose of the grant will be to inaugurate a Cooperative Education Act of 1965, as amended. The purpose of the grant will be to inaugurate a Cooperative Education Program in which students will alternate six months' study with six months of on-the-job experience. We intend for this program to provide a special opportunity for low-income and disadvantaged students to obtain a college education. The pattern of six months' study and six months' on-the-job experience will make a college degree financially more obtainable. The practical experience afforded by such a program will enhance the credentials of the participants. Cooperative

education should provide an avenue for low-income students, including many blacks, to enter occupations in which minorities are currently underrepresented. Initially, the program will operate within the College of Business, but ultimately it will function throughout the entire University.

(d) Contact with blacks at professional meetings. Black ASU professors will be permitted and encouraged to attend professional meetings at the state, regional, and national levels whenever possible. Personal contact with other blacks in a particular discipline can be a productive recruiting tool.

4.10 At present, the staff in the President's Office has the responsibility for monitoring the process of recruiting new faculty to insure that qualified blacks are given complete consideration in filling every vacancy. The specific procedures used to assure the implementation of ASU's affirmative action efforts and the data collection procedures used to measure the University's success will be developed by the Affirmative Action Officer, who will be functioning by December 1, 1975.

4.11 In summary, we believe that these positive steps, combined with the work of a full-time affirmative action staff, should enable ASU to reach its goals for hiring minority faculty and to comply with Title VI requirements.

5. STAFF HIRING

5.1 ASU has not implemented an effective program of recruiting blacks for professional administrative or classified staff positions. Efforts to recruit minority administrators and support personnel were not vigorous until recently. Consequently, the number of blacks presently employed is not impressive.

5.2 Since 1971, the number of blacks in non-faculty positions has increased. There is one black on the professional administrative staff, Dr. Mossie Richmond, Dean of the University College. His salary is commensurate with the starting salary of other new

deans. Since 1971, 18 blacks have been hired to fill classified positions. Six blacks have been offered employment since then and have refused the positions. As of the fall of 1975, 11 blacks hold 2.1% of all classified positions. Appendix K. Appendix L contains a work force analysis with each job title ranked by pay within each department or organizational unit.

5.3 Appendix M contains an availability and utilization analysis of the ASU staff and shows the numerical and percentage employment figures in six general categories. An examination of the analysis reveals that blacks are underutilized in every category except professional (non-faculty). Underutilization is significant enough in the secretarial/clerical and service/maintenance categories to require setting goals for increasing minority employment.

5.4 In the future we intend to take decisive steps to increase the percentage of blacks holding jobs at all levels of the administration. For every professional position to be filled, we will make every effort to identify and consider black applicants. In the area of classified employees (support staff), we anticipate that by the spring of 1980, we will need to fill 145 positions, of which 41 (28%) will be held by blacks. Appendix M. In-depth assessments of the efforts to achieve this goal shall be made biennially.

5.5 The University encounters the same difficulties in attracting black professional administrators that it does in attracting black faculty. Therefore, we will rely on the same strategies of vigorous recruitment in our own region and of generating our own black administrators from within by identifying prospects from among the student body and faculty.

5.6 ASU will take aggressive steps to increase the number of blacks who would be qualified, or qualifiable, for support staff positions. The following measures will be taken to recruit classified employees:

(a) High school contact. Business education teachers in the secondary schools in the University's service area will be asked to identify black students who do not plan to attend

college but who have demonstrated outstanding ability in typing, shorthand, and other business courses. The University will invite these students to participate in a short secretarial training program sponsored by the University. Upon successful completion of the program, the students will be offered positions at ASU.

(b) Vocational-technical school contact. The University will maintain close contact with nearby vocational-technical schools in order to identify blacks for employment in skilled positions, such as electrician, carpenter, and plumber.

(c) Employment service contact. Contacts with black placement services and with the Arkansas Employment Security Commission will be developed and maintained in order to identify blacks for immediate hiring and for on-the-job training.

(d) Identification of potential employees in student body. We will identify and offer financial assistance to black students in undergraduate and graduate business programs with a view to their ultimate employment in the University administration.

5.7 We have already set a new policy allowing all staff to enroll in any 3-hour course. We will encourage blacks presently employed to upgrade their skills and to apply for promotion and transfer opportunities.

5.8 The affirmative action officer who will be on the job by December 1, 1975, will design and implement a system of internal audit and report to measure the effectiveness of equal employment opportunity practices. Until then, the director of personnel will report to the President all hiring decisions each month so that progress toward reaching minority employment goals may be regularly evaluated.

5.9 We believe that these steps will be effective in increasing the percentage of blacks employed on the University staff and will enable ASU, in due time, to stand in full compliance with Title VI of the Civil Rights Act.

6. STATEMENT OF POLICY AND PURPOSE

6.1 Arkansas State University is committed to the principle of equality of opportunity for all Americans, including minority group members and women. Failure to incorporate minorities and women fully to all aspects of our society results in a waste of human resources and conflicts with fundamental concepts of human rights. Societal barriers have tended to discourage or preclude women and minority group members from participating fully in the opportunities presented by American life. It is not enough simply to reiterate a well-established goal that equal opportunity for minorities and women should pervade all aspects of University programs and practices. We must take affirmative action to achieve this goal.

6.2 The purpose of this affirmative action program is to reaffirm Arkansas State University's equal employment opportunity policy to recruit, hire, and promote persons in all job classifications without regard to race, color, religion, age, disability, sex, or national origin, except where sex or the lack of a disability is a *bona fide* [1] occupational qualification. All personnel actions such as recruitment, selection, compensation, benefits, promotions, transfers, layoff and return from layoff practices, and education are included in the University's equal employment opportunity policies and affirmative action program and shall be administered accordingly.

6.3 The ultimate responsibility for equal employment opportunity and the affirmative action program lies with the Board of Trustees and the President of Arkansas State University. An affirmative action officer who will be responsible for direct supervision of the program will be hired within sixty days. In the meantime, Mrs. Elizabeth Williams, Special Assistant to the President, is responsible for the program.

6.4 The affirmative action officer will be responsible for directing, coordinating, and monitoring the program and will work closely with other staff members to insure that all matters relating to

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[1] See E.E.O.C. guidelines Title 29, Labor, Chapter XIV, Part 1604 as amended, Section 1604.1, 1604.2.

academic, administrative, and staff hiring are in compliance with the objectives of the program. All vice presidents, deans, directors, departmental officers, supervisors, and all personnel responsible for hiring and promotion are charged to support the University's equal employment opportunity policies and affirmative action program and will provide leadership in carrying out the goals and objectives of the program.

Petitioner's Reply Brief

81-745

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NO.

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

BONNIE VALENTINE,

Petitioner,

VS.

EUGENE SMITH, INTERIM PRESIDENT OF ARKANSAS STATE UNIVERSITY, ET AL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI FROM FINAL JUDGMENT ENTERED BY THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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QUESTION PRESENTED

Can a state university absolutely preclude consideration of white applicants for selected faculty positions as a means of fulfilling an Affirmative Action goal?

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REASONS FOR GRANTING THE WRIT

Petitioner will attempt to briefly respond to a new argument raised by Respondents in their brief in opposition to the granting of the Writ. Respondents on the one hand do not concede that a race-conscious choice by ASU was made and then on the other hand argue that their action is justified by a proper Affirmative Action Program. Petitioner submits that Respondents cannot have it both ways. The evidence is clear and the Eighth Circuit agreed with Petitioner that the hiring of Georgia Mitchell, a black,

and the rejection of Bonnie Valentine, a white, was substantially motivated by a race-conscious choice by ASU to implement its Affirmative Action Plan. The very officials who were involved in a hiring process at Arkansas State University also testified that the rejection of Petitioner was a race-conscious choice. How Respondents can argue at this juncture that a race-conscious decision was not involved is incredible to Petitioner. Stated differently, the Eighth Circuit has justified the rejection of Petitioner by saying that this is pursuant to an Affirmative Action Plan and now in Respondents' brief, there is a denial at page 3 that a race-conscious decision was involved at all.

Respondents also attempt to argue that Petitioner has misconstrued the holding of the Eighth Circuit. Respondents argue that the Eighth Circuit has not approved a practice of allocating specific positions for minority applicants. Yet, factually, all parties agreed that Petitioner was the most qualified candidate for the position and that the only reason she was rejected was because she was white. In the words of the Eighth Circuit at A-15:

> ASU could achieve its legitimate goal of a faculty with five percent of its members being black if twenty-five percent of the new faculty members hired between 1976 and 1979 were black. Valentine argues that ASU illegitimately singled out the business college vacancy as an exclusively minority position in violation of the principles established in *Bakke*. Even assuming ASU set aside that vacancy as exclusively for blacks, the practice is defensible. To insure that the university achieves its affirmative action goal some coordinator must have the authority to reserve a particular position

> for a qualified minority applicant, if such applicant can be found . . .

Petitioner contends that this practice of reserving specific faculty positions at a state supported institution for minority applicants and absolute refusal to consider the higher qualifications of white applicants, if there are white applicants with such higher qualifications, is patently unconstitutional. This is the precise question presented by this factual situation and this Court should grant certiorari to rule on same.

Respectfully submitted,

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